

LEGISLATIVE MANAGEMENT'S INTERIM HUMAN SERVICES  
COMMITTEE

March 8, 2016

Presentation of

John E. Greenwood, Judge of the District Court, Southeast Judicial District

Chambers in Jamestown, North Dakota

Legislative or Administrative Actionable Items to Address the Unmet Needs Relating to  
Behavioral Health Services

1] Thank you for allowing me to appear before this committee today. I was asked to appear by the State Court Administrator to discuss issues that we in the court system see in our mental health commitment laws. I have one observation that I will discuss here today, and will discuss the administrative functions that can be carried out within existing human services and existing court rules, which I believe can be put in place to address the issue.

2] District court and municipal court judges and justices of the Supreme Court are aware that it is not uncommon in the criminal court system to have individuals charged with criminal offenses that, as one person commented to me “really are mental health cases.” Some of these individuals are first offenders, but, as is quite often the case, the individual is a repeat offender. Upon conviction we can impose fines and fees, probation, or jail, which one person commented is putting the problem out of sight, but not treating it. A court can order an evaluation and treatment as a probation condition, but the courts have limited ability to monitor the treatment progress. If a person violates probation by not seeking treatment, the person may end up back in

the courtroom. While further sanctions can be imposed, the underlying problem is not addressed.

3] Rule 32.2 of the North Dakota Rules of Criminal Procedure is entitled Pretrial Diversion. The rule prescribes a procedure where an individual who is charged with a criminal offense can enter into an agreement, subject to court approval, suspending prosecution and setting out conditions, which, if followed, would result in dismissal of the charged offense. One of the permitted conditions is “a rehabilitation program, which may include treatment, counseling, training, and education.” (Attached is Rule 32.2)

4] When a person who is mentally ill commits an offense, and is prosecuted for that offense, it would be beneficial to use pretrial diversion to put the person into mental health services in many of these cases. This deferred prosecution would have a treatment plan that has the backing of a suspended prosecution agreement approved by a judge, different from a voluntary treatment plan, which can be terminated by the individual at any time. The human service center would be the monitoring party, and report back to the prosecutor if there is a violation. I assume a coordinated treatment structure is currently in place within the human service centers, but treatment under a pretrial diversion agreement may require a treatment structure tailored to this scenario within each of the human service centers.

5] The current language of Rule 32.2 as stated above is general in nature, so it may be beneficial to expand the rule to have a specific section to address this case type.

6] I also point out that section (h) of Rule 32.2 does not preclude a similar type of diversion without court involvement when no formal complaint is filed with the court. In the case of an indigent person, this process would most likely not have a defense attorney who oftentimes is the one who would be the primary proponent of pretrial diversion.

7] The individual and the community may be better served when the parties involved, the prosecutor and the defense attorney, recognize that mental health treatment for the individual is more desirable than a criminal sanction. This can be accomplished with the proper treatment team structure. Most of us have heard about the frustration that a family goes through when a family member is mentally ill and refuses treatment. Unless the person requires treatment (is a serious risk of harm to the individual, others, or property) the person cannot be committed to a treatment program. If the person commits an offense, pretrial diversion is an option which may be used to provide that treatment. Hopefully, this would assist the individual in having a better life, and would reduce the risk of further or more serious offenses.

8] Implementation

Review the current treatment structure to determine if existing treatment plans are adaptable to this structure.

Identify a contact person at the human service center who can act as a screener in the event the parties believe a person may be a candidate for pretrial diversion.

Is it desirable to coordinate treatment with other agencies, such as social services, job services, etc.?

Determine if the current wording of Rule 32.2 is sufficient.

Encourage prosecutors and defense attorneys to consider the use of pretrial diversion.

## **RULE 32.2. PRETRIAL DIVERSION**

### **(a) Agreements Permitted.**

(1) Generally. After due consideration of the victim's views and subject to the court's approval, the prosecuting attorney and the defendant may agree that the prosecution will be suspended for a specified period after which it will be dismissed under Rule 32.2(f) on condition that the defendant not commit a felony, misdemeanor or infraction during the period. The agreement must be in writing and signed by the parties. It must state that the defendant waives the right to a speedy trial. It may include stipulations concerning the existence of specified facts or the admissibility into evidence of specified testimony, evidence, or depositions if the suspension of prosecution is terminated and there is a trial on the charge.

(2) Additional Conditions. Subject to the court's approval after due consideration of the victim's views and upon a showing of substantial likelihood that a conviction could be obtained and that the benefits to society from rehabilitation outweigh any harm to society from suspending criminal prosecution, the agreement may specify additional conditions to be observed by the defendant during the period, including:

(A) that the defendant not engage in specified activities, conduct, and associations;

(B) **that the defendant participate in, and if appropriate successfully complete, a rehabilitation program, which may include treatment, counseling, training, and education;**

(C) that the defendant make restitution in a specified manner for harm or loss caused by the crime charged;

(D) that the defendant pay specified fees or costs;

(E) that the defendant perform specified community service.

(3) Limitations on Agreements. The agreement may not specify a period longer or any condition other than could be imposed upon probation after conviction of the crime charged.

**(b) Filing of Agreement; Release.** Promptly after the agreement is made and approved by the court, the prosecuting attorney shall file the agreement together with a statement that under the agreement the prosecution is suspended for a period specified in the statement. Upon the filing, the defendant must be released under Rule 46 from any custody.

**(c) Modification of Agreement.** Subject to Rule 32.2 (a) and (b) and with the court's approval, the parties by mutual consent may modify the terms of the agreement at any time before its termination.

### **(d) Termination of Agreement; Resumption of Prosecution.**

The court may order the agreement terminated and the prosecution resumed if, upon motion of the prosecuting attorney stating facts supporting the motion and upon hearing, the court finds:

(1) the defendant or defense counsel misrepresented material facts affecting the agreement, if the motion is made within six months after the date of the agreement; or

(2) the defendant has committed a violation of the agreement, if the motion is made not later than one month after the expiration of the period of suspension specified in the agreement.

**(e) Emergency Order.** The court by warrant may direct any officer authorized by law to bring the defendant before the court for the hearing of the motion if the court finds from affidavit or testimony:

- (1) there is probable cause to believe the defendant committed a violation of the agreement; and
- (2) there is a substantial likelihood that the defendant otherwise will not attend the hearing. In any case the court may issue a summons instead of a warrant to secure the appearance of the defendant at the hearing.

**(f) Termination of Agreement; Dismissal.** If no motion by the prosecuting attorney to terminate the agreement is pending, the agreement is terminated and the complaint, indictment, or information must be dismissed by order of the court 60 days after expiration of the period of suspension specified by the agreement. If such a motion is then pending, the agreement is terminated and the complaint, indictment, or information must be dismissed by order of the court upon entry of a final order denying the motion. Following a dismissal under Rule 32.2(f) the defendant may not be further prosecuted for the offense involved.

**(g) Modification or Termination and Dismissal upon Defendant's Motion.** If, upon motion of the defendant and hearing, the court finds that the prosecuting attorney obtained the defendant's consent to the agreement as a result of a material misrepresentation by a person covered by the prosecuting attorney's obligation under Rule 16, the court may:

- (1) order appropriate modification of the terms resulting from the misrepresentation; or
- (2) if the court determines that the interests of justice require, order the agreement terminated, dismiss the prosecution, and bar further prosecution for the offense involved.

**(h) Pre-Charge Diversion.** This rule does not preclude the prosecuting attorney and defendant from agreeing to diversion of a case without court approval if charges are not pending before the court.